In the

United States

Court of Appeals

For the Ninth Circuit

MAKAH INDIAN TRIBE, a Corporation, CHARLES E. PETERSON, DAVID C. PARKER, KENNETH WARD, JOHN H. IDES and CLIFFORD JOHNSON, Individually and as Members of the COUNCIL OF THE MAKAH INDIAN TRIBE, *Appellants,*

v.

MILO MOORE, Director of the Department of Fisheries, State of Washington, *Respondent.*

No. 12751

APPEAL FROM THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

RESPONDENT'S BRIEF

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ADDITIONAL STATEMENT OF CASE.

Within the limits of the statement of the case by the appellants, we take no serious objection, but for the purpose of a better understanding of respondent's position, we submit the following additional statement of the case.

Appellants by their complaint sought a decree enjoining the respondents, among other things, from attempting to apply the laws of the State of Washington and the regulations of the Fisheries Department to the

plaintiffs; from prohibiting members of the appellant tribe from selling, trading, or bartering any fish caught in the waters of the Hoko River or Puget Sound adjacent thereto, and of catching fish for the purpose of such sale, trade or barter; prohibiting the appellants or any members of the Makah Tribe of Indians from clubbing, gaffing, shooting, snagging, snaring, worrying, spearing and stoning fish (R. 13).

The plaintiff alleged, among other things, that the respondent was interfering with the appellants' accustomed right to fish with seines, set nets, dip nets, clubs, spears, traps and other fishing gear in the Hoko River and the waters of the Puget Sound adjacent thereto (R. 6).

The appellants at the trial presented their case upon the theory that they were entitled to the relief asked for in their complaint. The respondent's position at the trial was that the regulation of fishing imposed was operative on all persons alike, reasonably adapted to the preservation of the salmon in the waters of the State for the common benefit of all citizens. The appellants' testimony established that salmon in approaching their spawning grounds schooled in great numbers in the ocean (R. 307); that as the salmon moved toward the mouths of the stream where the spawning area of the particular salmon is located, these salmon split off from the mass of fish and enter the estuary of their particular stream (R. 234, 250, 251). Substantially all of the streams in the State of Washington have an estuary (R. 251). The salmon, on entering this estuarial area, cease to feed and in the brackish water commence to feel the influence of the fresh water. They may stay in the stream for some time and when the fresh water conditions are right, they move up

the stream and proceed to their spawning ground (R. 250, 251). While in the estuarial area of the stream there is such a concentration of fish, and particularly in such a small stream as the Hoko River, the stream could be blocked and all fish removed (R. 254), with the result that an entire run of fish might be taken and the fish population of that particular stream dependent upon that particular run of fish would be gone forever since streams are not reseeded by stock from another stream (R. 254-255). Fish in the stream and in the spawning areas could be eliminated by spearing and other methods (R. 256, 310, 311).

Where the large schools are fished in the ocean, far from the mouths of the stream, and where the fish population is mixed, the danger of wiping out the spawning population of a particular stream is materially lessened (R. 250). It was the opinion of the experienced personnel of the Fisheries Department of the State of Washington that the Hoko River would not stand commercial fishing (R. 295). The experience of the Fisheries Department was that the supply of salmon in the State of Washington had been on the decline for several years (R. 322). The capacity of streams to produce fish had been lessened by many factors, including overfishing, deforestation, use of waters for other purposes, destruction of dams and other obstructions to the original flow of water (R. 303-305). It was the opinion of the expert personnel of the Fisheries Department that the regulations complained of were reasonably necessary to conserve the supply of salmon (R. 295, 305, 309). It was established that once substantial runs of Chinook salmon in the Hoko River had disappeared (R. 116, 117, 140). The opinion of the personnel of the Fisheries Department was based not only upon

the experience of the Fisheries Department in waters of Puget Sound but also in Alaska and other waters (R. 314-315).

The Department of Fisheries carries on an extensive hatchery of fish and artificially augments streams by planting fish, including several streams that run through Indian reservations. The respondent Department does not have the means to police the some 20 streams in the area in which the Hoko River is situated (R. 289, 290, 317). During the time the injunction was in force against the Department in the previous action between the Makah Indian Tribe and the Director of Fisheries, the Makah Indians fished the Hoko River and fished off the mouth of the river. Purse seine boats, drag seines and innumerable set nets were placed in the river itself and in the estuary, and the fish were molested the entire area of the river up to and including Hoko Falls where the fish were gaffed and taken out (R. 291, 292). About 20% of the adults of the Makah Indian Tribe engaged in commercial fishing in the waters of Puget Sound (R. 95, 97), and in 1948 the income to the Makah Indians from this fishing was approximately $7900.00 (R. 280).

The ultimate aim of the State of Washington and its Fisheries Department is to regulate the fishers so as to allow an adequate escapement to every stream in the State and to allow the fisheries to take that portion of the run that will not affect the future of that run (R. 305). The State of Washington has an established research program designed to accomplish this ultimate aim (R. 305).

The appellants submitted no evidence that the laws of the State of Washington or the regulations of the Fish-

eries Department applicable to fishing in Hoko River, as well as other streams, were unreasonable or unnecessary.

The trial court found that at the time of the ratification of the treaty in 1859 the Makah Indians had not fished the waters of Puget Sound adjacent to the Hoko River and it was not until several years thereafter that the Makah Indians fished in the Sound; that therefore the waters of Puget Sound were not a fishing ground or station guaranteed or secured by the treaty (R. 25); that the method of fishing by the Makah Indians had materially changed since the time of the treaty and that a substantial share of the total income of the Makah Tribe now comes from ocean salmon fishing (R. 26); that to permit the appellants to take the salmon when concentrated off the mouth of the Hoko River would in three or four years result in the elimination of the salmon run in the Hoko River; that the use of spears and nets in the river would quickly eliminate the salmon runs; that for several years past the salmon which entered the Hoko River were not salable and probably inedible (R. 30); that the regulations of the respondent were reasonable, fair and requisite, and did not discriminate against the Indians (R. 31).

ARGUMENT

The Laws and Regulations in Issue Here Are Valid Exercises of the Police Power of the State of Washington.

The power of the State to make and enforce regulations operative on all persons alike, reasonably adapted to and necessary for the preservation of wild life in the waters of the State for the common benefit and not intended to operate as a denial to the privileged Indian community of its right to fish, has been established as a lawful exercise of the police power of the State in the following cases:

Ward v. Race Horse, 163 U. S. 504, 41 L. Ed. 244;
Coyle v. Smith, 221 U. S. 559, 55 L. Ed. 853;
U. S. v. Winans, 198 U. S. 371, 49 L. Ed. 1089;
State ex rel. Kennedy v. Becker, 241 U. S. 566, 60 L. Ed. 1166;
Tulee v. Washington, 315 U. S. 681, 86 L. Ed. 1115;
McCauley v. Makah Tribe, 128 Fed. (2d) 867.

In the instant case there is no contention that the regulations imposed by the State were arbitrary or capricious, but on the contrary the record fully supports the trial court's finding that the regulations were fair, reasonable and requisite.

Appellants take the position that because of their claim that at the time the Treaty was executed the Tribe's use of fish in the Hoko River was unlimited, the State may not substantially limit the taking of fish from the Hoko River by the Tribe at the present time. Such a position is unrealistic and ignores present conditions that require, as established by the record, substantial regulations in order to conserve and perpetuate the salmon as a self-producing natural resource of the State of Washington. The conditions that existed at the time of the execu-

tion of this Treaty are entirely different from those that exist today. In considering the regulations in question and the Treaty rights of the appellants, we believe that the formula for such consideration is well stated in *State ex rel. Kennedy v. Becker*, *supra*, wherein the Supreme Court said:

> "It has frequently been said that treaties with the Indians should be construed in the sense in which the Indians understood them. But it is idle to suppose that there was any actual anticipation at the time the treaty was made of the conditions now existing, to which the legislation in question was addressed. Adopted when game was plentiful,—when the cultivation contemplated by the whites was not expected to interfere with its abundance—it can hardly be supposed that the thought of the Indians was concerned with the necessary exercise of inherent power under modern conditions for the preservation of wild life. But the existence of the sovereignty of the state was well understood, and this conception involved all that was necessarily implied in that sovereignty, whether fully appreciated or not. We do not think that it is a proper construction of the reservation in the conveyance to regard it as an attempt either to reserve sovereign prerogative, or so to divide the inherent power of preservation as to make its competent exercise impossible. Rather are we of the opinion that the clause is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands in common with the grantees, and others to whom the privilege might be extended, but subject, nevertheless, to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the state over the lands where the privilege was exercised. This was clearly recognized in *United States v. Winans*, 198 U. S. 371, 384, 49 L. Ed. 1089, 1903, 25 Sup. Ct. Rep. 662, where the court, in sustaining the fishing rights of the Indians on the Columbia River, under the provisions of the treaty between the United States and the Yakima Indians, ratified in 1859 (12 Stat. at L. 951), said (referring to the authority of the

> State of Washington): 'Nor does it' (that is, the right of 'taking fish at all usual and accustomed places') 'restrain the state unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enable the right to be exercised.' "

Applying the foreging rule, it is submitted that an interpretation of the Treaty must grant to the sovereign state the right to make reasonable regulations for the preservation of the supply of salmon as a natural resource of the State of Washington. The reservation of the Makah Tribe of the privilege of fishing in the Hoko River was necessarily subject to the right of the State to make appropriate regulations. In this connection, it should be pointed out that the appellants make no contention that the regulations are arbitrary or capricious or even unreasonable or unnecessary. Their complaint is that the regulations deprive them of the right to fish in the Hoko River except by hook and line. This deprivation of the privilege of fishing is, however, but incident to the reasonable and necessary conservation regulations, and the Indian citizens as well as all other citizens must bear the burden of such prohibition.

The appellant strongly relies upon the case of *U. S. v. Winans, supra.* This was an action brought by the United States to enjoin Winans Bros., who were engaged in a large commercial fishing enterprise, from refusing the Indians access to their ancient fishing places and depriving them of fishing rights by the actual monopoly of fishing privileges through maintenance of fishing wheels. The Supreme Court very properly sustained the Indians in their treaty guaranties against discrimination. The only issue involved was the land owner's attempt to ignore the Indians' easement. The land in question had passed from the Federal Government by patent title to a white

owner, who in addition had secured from the State of Washington a license to erect and operate a fishing wheel. The court held that the white owner had made it impossible for the Indian to enjoy fishing privileges on a parity with "citizens of the Territory." The case decided that the government grantee came into possession of land which was impressed with a perpetual servitude or easement, and even the State could not grant something additional which would impair that easement. This was not a case brought against the State to restrain the exercise of its inherent police power, but involved an invasion by private individuals of the rights of the Indians thereby discriminated against as a class, and so in this essential aspect the facts of the *Winans* case differ from the facts of the case at bar. After making clear that the provision in the treaty imposed a servitude on land which could not be extinguished, the court said, at p. 384:

> "Nor does it restrain the state unreasonably, if at all, in the regulation of the right. It only fixes in the land such easement as enables the right to be exercised."

The case is positive authority for the power of the State to regulate the taking of fish within its boundaries.

The case of *Tulee v. Washington, supra,* involved a treaty substantially the same as the treaty in the instant case and raised the question of the power to exact a license fee for the purpose of revenue from an Indian. The Supreme Court held "that while the treaty leaves the State with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish,

it forecloses the State from charging the Indians a fee of the kind in question." *

This court in *McCauley v. Makah Indian Tribe, supra,* had before it the same treaty as here involved. The case was before the trial court for a motion for judgment on the complaint. The complaint alleged and the trial court found that the Makah Indians prior to the treaty had customarily fished in the Hoko River "with seines, set nets, dip nets and other Indian fishing gear." The trial court held that the treaty guaranteed the Indians' right to fish with such gear and the judgment enjoined the defendant state officers from "in any manner whatsoever interfering with the exercise by the plaintiffs herein, or any of the members of the Makah Indian Tribe, of their rights and privilege of fishing in their usual and accustomed place (Hoko River hereinabove described)." The statute of the State of Washington, Rem. Rev. Stat., 5671-8, considered by this court, provided:

> "Pound nets, traps and other appliances prohibited. It shall be unlawful to construct, install, use, operate or maintain, within any of the waters of the State of Washington, any pound net, fish trap, fish wheel, scout fish wheel, set net, wier, or any fixed appliance for the purpose of catching salmon, salmon trout or steelhead, or to take salmon, salmon trout or steelhead by any such means."

This court reversed on the grounds that the decree of the court, in protecting the Indians' right to fish with "other Indian fishing gear," contained no finding as to what "other Indian fishing gear" might be. As this court pointed out, the gear might include one or another of the

* It is significant that the Supreme Court stressed the point that the license was for revenue as well as regulation; that the license imposed a charge upon the Indians' right to fish. Had the statute imposed a burden purely regulatory, it is believed the decision would have been different.

fixed appliances prohibited for the conservation of fish by the Washington statute above quoted. This court held that allowing fishing that was in violation of the conservation regulation of the State of Washington would be not in accord with *Tulee v. Washington, supra.*

This court, in reversing, granted the appellants (the Makah Tribe) permission "to amend their complaint and present their right to such claimed allowable methods of fishing, specifically described and not by such a general term as 'other Indian fishing gear' as they may be advised."

It is our position that this court, in this decision, restricted the right to fish to *allowable methods* under the Washington conservation statute. Since the type of fishing which the appellants specifically claim in the instant case clearly falls within the prohibition of the Washington statute, we submit that *McCauley v. Makah Indian Tribe, supra,* is conclusive of the issues in the instant case against the appellants herein.

This case is likewise conclusive against the appellants' prayer that the respondent be restrained from "prohibiting appellants from selling, trading or bartering any fish caught in the waters of the Hoko River or of the Puget Sound adjacent thereto and of catching fish for the purpose of such sale, trade or barter." The record is silent as to any threatened interference and for the further reason, as pointed out by this court, the treaty "is silent on the right of the Indians to dispose of fish by sale or barter."

This case is likewise conclusive against the appellants in their prayer that the respondent be restrained from interfering with their fishing in the waters of Puget Sound

adjacent to the Hoko River for the reason that the appellants failed to establish that the Indian Tribe had ever fished in Puget Sound at the time of the treaty. In fact the only evidence indicated that the Tribe commenced fishing in Puget Sound several years after the execution of the treaty, and therefore it cannot be held that such waters were a fishing ground or station reserved in the treaty by the Makah Tribe.

The Regulations Complained of Are Reasonable and Necessary.

It is submitted that the cited portions of the record fully establish the fairness and reasonableness of the respondent's regulations. In the instant case the inherent power of the State is being exercised for the benefit of the appellants as well as all other citizens towards the end that the salmon industry of the State of Washington may be preserved. It is idle to say that the State has the power to regulate and in the same breath to say that the Indians may exercise a claimed ancient custom of taking fish regardless of the sound principles of conservation and a custom which, if permitted, would destroy the salmon resource. The record fully supports the succinct finding of Judge Black in his oral opinion wherein he said:

> "Under the evidence the conservation laws and regulations applicable to and being applied to the Hoko River and waters of Puget Sound adjacent thereto are entirely reasonable and moreover, are clearly necessary for the conservation of the salmon life in the Hoko River, and are essential and requisite for the existence of any salmon in the future in said stream. It is noteworthy that there was no evidence at all submitted to the effect that the regulations or laws were unreasonable or unnecessary. The plaintiffs have satisfied themselves with such showing as they made of certain fishing by Makah Indians in

the Hoko River, and with contending that under the treaty they were immune from conservation laws or regulations." (R. 24.)

As found by Judge Black in his opinion, the regulations clearly inure to the benefit of the appellants in that the regulations insure to the appellants a reasonable supply of salmon off Cape Flattery, from which supply the appellants have been and are benefiting through their commercial fishing.

We feel it is unnecessary to unduly extend this brief by extensive quotations from the record, and it is respectfully submitted that the record fully supports the findings of the trial court and that the judgment appealed from should be affirmed.

Respectfully submitted,

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